1 KEKER & VAN NEST LLP   SUSAN CREIGHTON, SBN 135528
   ROBERT A. VAN NEST - # 84065   SCOTT A. SHER, SBN 190053
2 BRIAN L. FERRALL - # 160847   WILSON SONSINI GOODRICH & ROSATI
   DAVID SILBERT - # 173128   Professional Corporation
3 MICHAEL S. KWUN - #198945   1700 K Street NW, Fifth Floor
   ASHOK RAMANI - # 200020   Washington, D.C., 20006-3817
4 633 Battery Street   Telephone: (202) 973-8800
   San Francisco, CA 94111-1809   Email: screighton@wsgr.com;
5 Telephone: (415) 391-5400   ssher@wsgr.com
   Email: rvannest@kvn.com;
6 bferrall@kvn.com; dsilbert@kvn.com;
   mkwun@kvn.com, aramani@kvn.com
7
   JONATHAN M. JACOBSON, NY SBN 1350495
8 CHUL PAK (*pro hac vice*)
   DAVID H. REICHENBERG (*pro hac vice*)
9 WILSON SONSINI GOODRICH & ROSATI
   Professional Corporation
10 1301 Avenue Of The Americas, 40th Floor
   New York, NY 10019-6022
11 Telephone: (212) 999-5800
   Email: jjacobson@wsgr.com; cpak@wsgr.com;
12 dreichenberg@wsgr.com

13 Attorneys for Defendant ARISTA NETWORKS, INC.

14
                    UNITED STATES DISTRICT COURT
15
                  NORTHERN DISTRICT OF CALIFORNIA
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                        SAN JOSE DIVISION
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18 | CISCO SYSTEMS, INC., | Case No. 5:14-cv-05344-BLF (NC) |

19 | Plaintiff, | **REPLY IN SUPPORT OF MOTION TO COMPEL** |

20 | v. | Judge: Hon. Nathanael Cousins |

21 | ARISTA NETWORKS, INC., | Date Filed: December 5, 2014 |

22 | Defendant. | Trial Date: November 21, 2016 |

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1   This reply addresses two new arguments in Cisco's opposition to Arista's Motion to

2   Compel, ECF Nos. 278 (Mot.), 312 (Opp.), neither of which has merit.

3   First, Cisco appears to argue that because a plaintiff can assert copying of "non-literal

4   elements" of a work (*id.* at 1:13–14), Cisco need not identify *literal* elements that it asserts Arista

5   copied. If Cisco were only asserting copying of non-literal elements, then perhaps its position

6   would have merit. But Cisco apparently seeks to maintain flexibility to assert copying of literal

7   text also. *See id.* at 1:12-13. If so, it must identify that text in a registered work. Otherwise,

8   there is no way to know whether any asserted literal element was even registered, and if so when,

9   or whether the text was allegedly copied verbatim or loosely paraphrased.

10   Cisco has not disclosed this information. Exhibit A to the Neukom Declaration, ECF Nos.

11   313-1 to 313-6, was attached to an interrogatory response that says that it lists "examples" of

12   copying. ECF No. 306-2 at 9:24–27. If that exhibit identifies *all* literal elements of all registered

13   works that Cisco asserts were copied, Cisco should so state, and fill in the Bates Number citations

14   to the actual registered works, which response can then define the scope of the case. But if it

15   intends to assert at trial that more literal elements were copied, it must identify them—it can't

16   force Arista to guess, especially when the answer is far from clear.[1]

17   Second, Cisco's argument that it deposited only excerpts of its source code files with the

18   Copyright Office misses the point. The purpose of the deposit is to disclose "identifying

19   portions" of the registered work to the Copyright Office and the public. 37 C.F.R. §

20   202.20(c)(2)(vii)(A). Arista understands that Cisco is relying on the entire registered work, not

21   just the deposited portion, and Arista is entitled to know what literal elements within those works

22   were allegedly copied. If Cisco cannot supply this basic information at the close of discovery,

23   that should only be because Cisco will not assert at trial that Arista copied any such literal

24   elements. Cisco cannot refuse to identify those elements to Arista in discovery, while

25   simultaneously reserving its right to present them to the jury.

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[1] Cisco also cites to Exhibits B and C to its response to Interrogatory 2, ECF Nos. 313-7, 313-8,
27   which simply list a host of Cisco operating systems allegedly associated with each command or
mode, but those are lawyer-created charts. They are not evidence that Cisco could use to show
28   that the command is present in those operating systems or a particular registered product manual,
or that Arista could use to test the accuracy of Cisco's assertions

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2   Dated: June 16, 2016   KEKER & VAN NEST LLP

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4   By: */s/ Brian L. Ferrall*
                                                 BRIAN L. FERRALL
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7   Attorney for Defendant
                                           ARISTA NETWORKS, INC.
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REPLY IN SUPPORT OF MOTION TO COMPEL
Case No. 5:14-cv-05344-BLF (NC)

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